

2009 DRAFTING REQUEST**Bill**Received: **11/17/2008**Wanted: **As time permits**For: **Lena Taylor (608) 266-5810**This file may be shown to any legislator: **NO**

May Contact:

Subject: **Criminal Law - procedure**Received By: **chanaman**

Identical to LRB:

By/Representing: **Eric**Drafter: **chanaman**

Addl. Drafters:

Extra Copies:

released
toSen. Kretlow
see attachmentSubmit via email: **YES**Requester's email: **Sen.Taylor@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

John Doe proceedings

Instructions:

See attached--2007 SB 537 with SA 1

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	chanaman 11/17/2008	bkraft 11/28/2008					S&L
/1	chanaman 01/21/2009	bkraft 01/21/2009	mduchek 12/01/2008		cduerst 12/01/2008		S&L
/2			phenry 01/21/2009		lparisi 01/21/2009	mbarman 01/21/2009	

FE Sent For:

<END>

→ At Intro.

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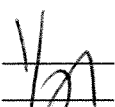
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/?	chanaman	11 bjk 11/28	M 12/1	M) RS 12/1			

FE Sent For:

<END>

-0826/h
e bjk
RPN

2007 SENATE BILL 537

2009 BILL

Inserts

PWF

SAV
x-refv

February 26, 2008 – Introduced by Senators TAYLOR, HANSEN, LEHMAN, ERPENBACH and ROESSLER, cosponsored by Representatives GRIGSBY and TURNER. Referred to Committee on Judiciary, Corrections, and Housing.

- 1 AN ACT *to renumber and amend* 968.26; *to amend* 911.01 (4) (b), 972.08 (2)
- 2 and 978.045 (1r) (intro.); and *to create* 968.26 (1) and 968.26 (2) (b), (d) and (e)
- 3 of the statutes; **relating to:** judicial discretion in certain John Doe proceedings

Analysis by the Legislative Reference Bureau

Under current law, under a John Doe proceeding, a person who believes a crime has been committed may complain to a judge. Then the judge must ascertain if a crime has been committed. The scope of examination is within the judge's discretion. If the judge determines that a crime has probably been committed, she or he will issue a warrant for the arrest of the accused.

Under this bill, if a district attorney who believes a crime has been committed complains to a judge, the judge must convene a John Doe proceeding as described above except that the judge does not issue a warrant for the arrest of the accused because the district attorney has that ability as under current law. If a person other than a district attorney who believes a crime has been committed complains to a judge, the judge must refer the complaint to the district attorney. If the district attorney refuses in writing to issue a charge or takes no action for 90 days, the judge must convene a proceeding if the judge determines that the proceeding is necessary to determine if a crime has been committed. The judge has discretion over the scope of the examination, and the judge may issue a criminal complaint if the judge finds sufficient evidence to warrant prosecution. In determining whether to convene a proceeding and whether to issue a complaint, this bill specifies that a judge may consider law enforcement investigative reports, records and case files of the district attorney, and any other written records.

SENATE BILL 537

*Insert
an
Err* → This bill also adds statutory cross-references to three John Doe references to ✓
aid individuals in finding the John Doe statute.

→ For further information see the **state and local** fiscal estimate, which will be
printed as an appendix to this bill.

*ins
21* → **The people of the state of Wisconsin, represented in senate and assembly, do
enact as follows:**

1 **SECTION 1.** 911.01 (4) (b) of the statutes is amended to read:

2 911.01 (4) (b) *Grand jury; John Doe proceedings.* Proceedings before grand
3 juries or a John Doe proceeding under s. 968.26. ✓

4 **SECTION 2.** 968.26 of the statutes is renumbered 968.26 (2) (a) and amended
5 to read:

6 968.26 (2) (a) If a person who is not a district attorney complains to a judge that
7 he or she has reason to believe that a crime has been committed within his or her the
8 judge's jurisdiction, the judge shall refer the complaint to the district attorney. ✓

9 (c) In a proceeding convened under par. (b), the judge shall subpoena and
10 examine the complainant under oath the complainant and any witnesses produced
11 by him or her and may, and at the request of the district attorney shall, subpoena and
12 examine other witnesses that the judge determines to be necessary and appropriate
13 to ascertain whether a crime has been committed and by whom committed. The
14 judge shall consider the credibility of testimony in support of and opposed to the
15 person's complaint. ✓

16 **(3)** The extent to which the judge may proceed in the an examination under sub.
17 (1) or (2) is within the judge's discretion. The examination may be adjourned and may
18 be secret. Any witness examined under this section may have counsel present at the
19 examination but the counsel shall not be allowed to examine his or her client,
20 cross-examine other witnesses, or argue before the judge. ~~If it appears probable from~~

SENATE BILL 537

1 ~~the testimony given that a crime has been committed and who committed it, the~~
2 ~~complaint may be reduced to writing and signed and verified; and thereupon a~~
3 ~~warrant shall issue for the arrest of the accused.~~ Subject to s. 971.23, if the
4 proceeding is secret, the record of the proceeding and the testimony taken shall not
5 be open to inspection by anyone except the district attorney unless it is used by the
6 prosecution at the preliminary hearing or the trial of the accused and then only to
7 the extent that it is so used. A court, on the motion of a district attorney, may compel
8 a person to testify or produce evidence under s. 972.08 (1). The person is immune
9 from prosecution as provided in s. 972.08 (1), subject to the restrictions under s.
10 972.085. ✓

X
11 **SECTION 3.** 968.26 (1) of the statutes is created to read:

12 968.26 (1) If a district attorney requests a judge to convene a proceeding to
13 determine whether a crime has been committed in the court's jurisdiction, the judge
14 shall convene a proceeding described under sub. (3) and shall subpoena and examine
15 any witnesses the district attorney identifies. ✓

X
16 **SECTION 4.** 968.26 (2) (b), (d) and (e) of the statutes are created to read:

17 968.26 (2) (b) If a district attorney receives a referral under par. (a), and the
18 district attorney refuses in writing to issue charges or the district attorney takes no
19 action within 90 days, the judge shall convene a proceeding described under sub. (3)
20 if the judge determines that a proceeding is necessary to determine if a crime has
21 been committed. ✓

22 (d) In a proceeding convened under par. (b), the judge may issue a criminal
23 complaint if the judge finds sufficient credible evidence to warrant a prosecution of
24 the complaint. ✓

SENATE BILL 537

SECTION 4

1 (e) When determining whether the proceeding is necessary under par. (b) and
2 when determining whether to issue a complaint under par. (d), in addition to any
3 testimony under par. (c), the judge may consider law enforcement investigative
4 reports, the records and case files of the district attorney, and any other written
5 records that the judge finds relevant. ✓

6 **SECTION 5.** 972.08 (2) of the statutes is amended to read:

7 972.08 (2) Whenever a witness attending in any court trial or appearing before
8 any grand jury or John Doe investigation under s. 968.26 fails or refuses without just
9 cause to comply with an order of the court under this section to give testimony in
10 response to a question or with respect to any matter, the court, upon such failure or
11 refusal, or when such failure or refusal is duly brought to its attention, may
12 summarily order the witness's confinement at a suitable place until such time as the
13 witness is willing to give such testimony or until such trial, grand jury term, or John
14 Doe investigation under s. 968.26 is concluded but in no case exceeding one year. No
15 person confined under this section shall be admitted to bail pending the
16 determination of an appeal taken by the person from the order of confinement. ✓

17 **SECTION 6.** 978.045 (1r) (intro.) of the statutes is amended to read:

18 978.045 (1r) (intro.) Any judge of a court of record, by an order entered in the
19 record stating the cause for it, may appoint an attorney as a special prosecutor to
20 perform, for the time being, or for the trial of the accused person, the duties of the
21 district attorney. An attorney appointed under this subsection shall have all of the
22 powers of the district attorney. The judge may appoint an attorney as a special
23 prosecutor at the request of a district attorney to assist the district attorney in the
24 prosecution of persons charged with a crime, in grand jury proceedings or John Doe
25 proceedings under s. 968.26, in proceedings under ch. 980, or in investigations. The

SENATE BILL 537

1 judge may appoint an attorney as a special prosecutor if any of the following
2 conditions exists:✓

3 **SECTION 7. Initial applicability.**

4 (1) This act first applies to complaints made on the effective date of this
5 subsection.✓

6 (END)

**SENATE AMENDMENT 1,
TO 2007 SENATE BILL 537**

March 4, 2008 – Offered by Senators TAYLOR and ERPENBACH.

1 At the locations indicated, amend the bill as follows:

2 **1.** Page 1, line 3: after “proceedings” insert “and the provision of attorney
3 representation of state employees at John Doe proceedings”.

4 **2.** Page 2, line 1: before that line insert:

5 “SECTION ~~1g.~~ 895.46 (9) of the statutes is created to read:

6 895.46 (9) The protection afforded by this section applies to a proceeding under
7 s. 968.26 in which a state officer or state employee is a subject to charges for acting
8 within his or her official capacity, if that officer or employee is found to be acting
9 within the scope of his or her employment, and if the attorney general determines
10 that the state officer or state employee acted in good faith. Regardless of the
11 determination made by the attorney general, the protection afforded by this section
12 applies if the state officer or employee is not found guilty ⁱⁿ of the criminal action
13 commenced as a result of the proceeding under s. 968.26. This protection includes

criminal

1 the payment of reasonable attorney fees in defending the action and costs or fines
2 arising out of the *criminal* action." ✓

3 **3.** Page 2, line 1: delete "**SECTION 1**" and substitute "**SECTION 1m**".

4 (END)

*end of
Tns
2-1*

2009-2010 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0826/ins
RPN:.....

1

insert anlrn:

Under current law, if an action is brought against a state officer or employee for acts committed while carrying out his or her state duties, and the court finds that the defendant was acting within the scope of his or her employment, the state pays the damages and costs, and provides legal representation or pays the defendant's attorney fees and litigation costs. ✓

This bill provides these protections and benefits to a state officer or employee who is the subject of a John Doe proceeding if the charge is for an act done within the person's official capacity, within the scope of the person's employment, and the attorney general determined that the person was acting in good faith. In addition, ✓ these protections and benefits apply regardless of the attorney general's determination of good faith if the person is found not guilty in a criminal action commenced as the result of the John Doe proceeding. The bill provides that the protections and benefits provided include the payment of attorney fees, costs, and fines arising out of the criminal action.

John Doe Reform – Possible Amendment to LRB 09-0826/1

As discussed at the 12/9/08 and 1/13/09 Legislative Committee meetings, amend proposed s. 968.26 (2)(b) to read as indicated below:

(This is the original wording from the bill.)

SECTION 5. 968.26 (2) (b), (d) and (e) of the statutes are created to read:

968.26 (2) (b) If a district attorney receives a referral under par. (a), and the district attorney refuses in writing to issue charges or the district attorney takes no action within 90 days, the judge shall convene a proceeding described under sub. (3) if the judge determines that a proceeding is necessary to determine if a crime has been committed.

(This is the proposed wording.)

968.26 (2) (b) If a district attorney receives a referral under par. (a), the district attorney shall, within 90 days, issue charges or explain in writing the reasons for refusing to issue charges. If the district attorney does not issue charges, the district attorney shall forward all law enforcement investigative reports and the records and case files of the district attorney to the court. If the district attorney refuses to issue charges, the court shall convene a proceeding described under sub. (3) if the court determines that a proceeding is necessary to determine if a crime has been committed.

2, may / shall

too



State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-0826/1

CMH:RPN:bjk:md

2009 BILL

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Inserts

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1 AN ACT *to renumber and amend* 968.26; *to amend* 911.01 (4) (b), 972.08 (2)
2 and 978.045 (1r) (intro.); and *to create* 895.46 (9), 968.26 (1) and 968.26 (2) (b),
3 (d) and (e) of the statutes; **relating to:** judicial discretion in certain John Doe
4 proceedings and the provision of attorney representation of state employees at
5 John Doe proceedings.

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Under current law, under a John Doe proceeding, a person who believes a crime has been committed may complain to a judge. Then the judge must ascertain if a crime has been committed. The scope of examination is within the judge's discretion. If the judge determines that a crime has probably been committed, she or he will issue a warrant for the arrest of the accused.

Under this bill, if a district attorney who believes a crime has been committed complains to a judge, the judge must convene a John Doe proceeding as described above except that the judge does not issue a warrant for the arrest of the accused because the district attorney has that ability as under current law. If a person other than a district attorney who believes a crime has been committed complains to a judge, the judge must refer the complaint to the district attorney. If the district attorney refuses in writing to issue a charge or takes no action for 90 days, the judge must convene a proceeding if the judge determines that the proceeding is necessary to determine if a crime has been committed. The judge has discretion over the scope of the examination, and the judge may issue a criminal complaint if the judge finds

BILL

sufficient evidence to warrant prosecution. In determining whether to convene a proceeding and whether to issue a complaint, this bill specifies that a judge may consider law enforcement investigative reports, records and case files of the district attorney, and any other written records. *that the judge finds relevant*

This bill also adds statutory cross-references to three John Doe references to aid individuals in finding the John Doe statute.

Under current law, if an action is brought against a state officer or employee for acts committed while carrying out his or her state duties, and the court finds that the defendant was acting within the scope of his or her employment, the state pays the damages and costs, and provides legal representation or pays the defendant's attorney fees and litigation costs.

This bill provides these protections and benefits to a state officer or employee who is the subject of a John Doe proceeding if the charge is for an act done within the person's official capacity, within the scope of the person's employment, and the attorney general determined that the person was acting in good faith. In addition, these protections and benefits apply regardless of the attorney general's determination of good faith if the person is found not guilty in a criminal action commenced as the result of the John Doe proceeding. The bill provides that the protections and benefits provided include the payment of attorney fees, costs, and fines arising out of the criminal action.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

✓
SECTION 1. 895.46 (9) of the statutes is created to read:

895.46 (9) The protection afforded by this section applies to a proceeding under s. 968.26 in which a state officer or state employee is a subject to charges for acting within his or her official capacity, if that officer or employee is found to be acting within the scope of his or her employment, and if the attorney general determines that the state officer or state employee acted in good faith. Regardless of the determination made by the attorney general, the protection afforded by this section applies if the state officer or employee is not found guilty in the criminal action commenced as a result of the proceeding under s. 968.26. This protection includes

BILL

1 the payment of reasonable attorney fees in defending the criminal action and costs
2 or fines arising out of the criminal action.

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4 911.01 (4) (b) *Grand jury; John Doe proceedings.* Proceedings before grand
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7 to read:

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9 he or she has reason to believe that a crime has been committed within his or her the
10 judge's jurisdiction, the judge shall refer the complaint to the district attorney.

11 (c) In a proceeding convened under par. (b), the judge shall subpoena and
12 examine the complainant under oath the complainant and any witnesses produced
13 by him or her and may, and at the request of the district attorney shall, subpoena and
14 examine other witnesses that the judge determines to be necessary and appropriate
15 to ascertain whether a crime has been committed and by whom committed. The
16 judge shall consider the credibility of testimony in support of and opposed to the
17 person's complaint.

18 (3) The extent to which the judge may proceed in the an examination under sub.
19 (1) or (2) is within the judge's discretion. The examination may be adjourned and may
20 be secret. Any witness examined under this section may have counsel present at the
21 examination but the counsel shall not be allowed to examine his or her client,
22 cross-examine other witnesses, or argue before the judge. If it appears probable from
23 the testimony given that a crime has been committed and who committed it, the
24 complaint may be reduced to writing and signed and verified; and thereupon a
25 warrant shall issue for the arrest of the accused. Subject to s. 971.23, if the

BILL**SECTION 3**

proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used. A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08 (1). The person is immune from prosecution as provided in s. 972.08 (1), subject to the restrictions under s. 972.085.

SECTION 4. 968.26 (1) of the statutes is created to read:

968.26 (1) If a district attorney requests a judge to convene a proceeding to determine whether a crime has been committed in the court's jurisdiction, the judge shall convene a proceeding described under sub. (3) and shall subpoena and examine any witnesses the district attorney identifies.

SECTION 5. 968.26 (2) (b), (d) and (e) of the statutes are created to read:

968.26 (2) (b) If a district attorney receives a referral under par. (a), and the district attorney refuses in writing to issue charges or the district attorney takes no action within 90 days, the judge shall convene a proceeding described under sub. (3) if the judge determines that a proceeding is necessary to determine if a crime has been committed.

(d) In a proceeding convened under par. (b), the judge may issue a criminal complaint if the judge finds sufficient credible evidence to warrant a prosecution of the complaint.

(e) When determining whether the proceeding is necessary under par. (b) and when determining whether to issue a complaint under par. (d), in addition to any testimony under par. (c), the judge may consider law enforcement investigative

BILL

1 reports, the records and case files of the district attorney, and any other written
2 records that the judge finds relevant.

3 **SECTION 6.** 972.08 (2) of the statutes is amended to read:

4 972.08 (2) Whenever a witness attending in any court trial or appearing before
5 any grand jury or John Doe investigation under s. 968.26 fails or refuses without just
6 cause to comply with an order of the court under this section to give testimony in
7 response to a question or with respect to any matter, the court, upon such failure or
8 refusal, or when such failure or refusal is duly brought to its attention, may
9 summarily order the witness's confinement at a suitable place until such time as the
10 witness is willing to give such testimony or until such trial, grand jury term, or John
11 Doe investigation under s. 968.26 is concluded but in no case exceeding one year. No
12 person confined under this section shall be admitted to bail pending the
13 determination of an appeal taken by the person from the order of confinement.

14 **SECTION 7.** 978.045 (1r) (intro.) of the statutes is amended to read:

15 978.045 (1r) (intro.) Any judge of a court of record, by an order entered in the
16 record stating the cause for it, may appoint an attorney as a special prosecutor to
17 perform, for the time being, or for the trial of the accused person, the duties of the
18 district attorney. An attorney appointed under this subsection shall have all of the
19 powers of the district attorney. The judge may appoint an attorney as a special
20 prosecutor at the request of a district attorney to assist the district attorney in the
21 prosecution of persons charged with a crime, in grand jury proceedings or John Doe
22 proceedings under s. 968.26, in proceedings under ch. 980, or in investigations. The
23 judge may appoint an attorney as a special prosecutor if any of the following
24 conditions exists:

25 **SECTION 8. Initial applicability.**

SECTION 8

3 (END)

2009-2010 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0826/2ins
CMH:.....

1 Insert A

2 ^{N/A} In determining whether to issue a complaint, this bill specifies that the judge
must consider law enforcement investigative reports, records and case files of the
district attorney, and any other written records that the judge finds relevant.

3 Insert 4-18

4 ^{N/A} (b) If a district attorney receives a referral under par. (c), ^{ca} the district attorney
5 shall, within 90 days of receiving the referral, issue charges or refuse to issue
6 charges. If the district attorney refuses to issue charges, the district attorney shall
7 forward to the judge in whose jurisdiction the crime has allegedly been committed
8 all law enforcement investigative reports on the matter, his or her records and case
9 files on the matter, and a written explanation why he or she refused to issue charges.
10 The judge shall convene a proceeding as described under sub. (3) if he or she
11 determines that a proceeding is necessary to determine if a crime has been
12 committed. When determining if ^{g/a} ~~the~~ proceeding is necessary, the judge may consider
13 ^{the} law enforcement investigative reports, the records and case files of the district
14 attorney, and any other written records that the judge finds relevant ^o

15

16 Insert 4-21

17 ^{N/A} The judge shall consider, in addition ^e to any testimony under par. (c), ^{the} law
18 enforcement investigative reports, the records and case files of the district attorney,
19 and any other written reports that the judge finds relevant.

Barman, Mike

From: Peterson, Eric
Sent: Wednesday, January 21, 2009 1:14 PM
To: LRB.Legal
Subject: Draft Review: LRB 09-0826/2 Topic: John Doe proceedings

RUSH

Please Jacket LRB 09-0826/2 for the SENATE.

Parisi, Lori

From: Hanaman, Cathlene
Sent: Wednesday, January 28, 2009 2:05 PM
To: Christina Duerst; Lori Northrop; Mike Barman; Sarah Basford
Subject: FW: Draft Release

Could you print this for the drafting file? I'll send Matt a copy. No rush.

From: Peterson, Eric
Sent: Wednesday, January 28, 2009 1:59 PM
To: Nelson, Robert P.; Hanaman, Cathlene
Cc: Pagel, Matt
Subject: Draft Release

Cathelene and/or Bob:

Please release the draft on John Doe (LRB 09-0826/2) to Senator Kreitlow's office.

Thanks,
Eric

Eric M. Peterson

Chief of Staff, Senator Lena C. Taylor
Wisconsin State Senator - 4th Senate District
t - 608-266-5810 f - 608-267-2353